STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 25, 2007
v	No. 273134 Wayne Circuit Court
EZEKIEL DAVIS, Defendant-Appellee.	LC No. 06-005680-01

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order of dismissal entered following the grant of defendant's motion to suppress evidence. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews a trial court's factual findings at a suppression hearing for clear error but reviews the ultimate ruling on a motion to suppress de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). The application of the exclusionary rule is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001).

The officers testified that they stopped because they smelled burning marijuana emanating from defendant's van as they drove by. The court disbelieved that testimony. That finding was not clearly erroneous. Therefore, it must be assumed that the police had no reason for stopping their car and approaching defendant's vehicle. The trial court held that such action constituted a Fourth Amendment seizure. We disagree.

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "A person is 'seized' within the meaning of the Fourth Amendment if, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *People v Armendarez*, 188 Mich App 61, 69; 468 NW2d 893 (1991), quoting *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988). "[T]o constitute a seizure for purposes of the Fourth Amendment there must be either the application of physical

force or the submission by the suspect to an officer's show of authority." *People v Lewis*, 199 Mich App 556, 559; 502 NW2d 363 (1993). A police approach for questioning on the street does not amount to an investigatory stop "unless there exist intimidating circumstances leading the person to reasonably believe he was not free to leave or the person rebuffs the police officer by refusing to answer and walking away." *People v Daniels*, 160 Mich App 614, 619; 408 NW2d 398 (1987). "When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005).

There is no evidence that the officers exhibited some display of authority, e.g. activated their lights and siren, displayed their weapons, or issued orders to defendant as they approached. See *People v Mamon*, 435 Mich 1, 12; 457 NW2d 623 (1990). Further, there is no evidence that defendant tried to leave upon seeing the officers approaching and was prevented from doing so. Therefore, in stopping their car and approaching defendant, the officers did not seize him. An officer testified that, upon approaching the van, he saw defendant drop a bag of what appeared to be marijuana on the seat, which was retrieved by officers during the search of the vehicle. Although the trial court did not believe the testimony of officers regarding the presence of burned marijuana, the trial court did not question the credibility of the officers regarding their observation that defendant dropped a bag of suspected marijuana on the front seat of the vehicle as they approached. That observation created a reasonable suspicion that defendant was committing the misdemeanor offense of possession of marijuana, MCL 333.7403(2)(d), and the police could detain him to investigate. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). As part of that investigation, they could ask defendant to step out of the car. *People v Martinez*, 187 Mich App 160, 166-167; 466 NW2d 380 (1991), remanded on other grounds 439 Mich 986 (1992). When they did, defendant tried to run, which constituted the felony offense of obstructing an officer, MCL 750.81d(1); *People v Pohl*, 207 Mich App 332, 333; 523 NW2d 634 (1994), and defendant could be arrested without a warrant. MCL 764.15(1)(a). A struggle ensued and the gun fell out of defendant's pants. The police could seize the gun under the plain view doctrine. *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). Therefore, the trial court erred in ordering suppression.

Reversed and remanded for reinstatement of the charge. Jurisdiction is not retained.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood